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No. 15-1391

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, ET AL.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN,
ATTORNEY GENERAL OF NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari to United States Court of Appeals for the Second Circuit

BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, US CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose missions are to advance the interests of cities, counties, and other local governments. They file this brief to address the proper constitutional treatment of price regulations of the sort at issue in this case, a matter of considerable practical importance both to governments at all levels and to the individuals who are served by those governments. *Amici* include:

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans and 49 state municipal leagues.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to the constitutionality of N.Y. Gen. Bus. Law § 518, which bars retailers from imposing surcharges when customers make purchases with a credit card. Although Section 518 by its plain terms addresses only conduct—and although petitioners concede that the statute "'on its face appear[s] neutral'" (Pet. Br. 27)—petitioners nevertheless submit that the surcharge prohibition actually restricts speech and therefore is subject to heightened scrutiny. But in this case, at least, appearances are not deceiving: the surcharge prohibition is directed at, and affects, the setting of prices, not speech or expressive conduct. As a straightforward economic regulation, the law therefore is subject to, and easily survives, rational basis review.

A. Since pre-Revolutionary times, it has been understood that governments at all levels may regulate prices. Such laws have always been thought to regulate conduct, and therefore not to be subject to First Amendment scrutiny. To be sure, an act (like charging a price) may have an expressive component that makes it equivalent to speech. But that is so only if (1) the actor intends to convey a message and (2) the likelihood is great that the message will be understood without additional explanatory speech. Absent these considerations, the simple fact that actions affect the behavior of the people exposed to them does not convert that conduct into speech.

Here, the text, operation, and background of Section 518 all indicate that it is a regulation of conduct, not a restriction of speech. On the face of it, the statute does nothing more than bar the imposition of credit-card surcharges, limiting a retailer's ability to engage in what unquestionably is a non-expressive act. Such a rule—which precludes the imposition of certain charges to a product's "sticker" price—is not purely semantic in effect; it has a real-world impact on the amount that may permissibly be charged once the sticker price is set. Beyond that, Section 518 has no effect on speech, imposing no limits on the statements that merchants may make about any subject, including the desirability of credit-card surcharges. The legislative background confirms that the regulation was intended to restrict retailer conduct by discouraging price gouging and excessive credit-card markups, not to suppress speech. Reading such a law as a restriction on speech finds no support in this Court's decisions and would make many forms of familiar economic regulation impossible.

B. If Section 518 nevertheless were thought to impose an incidental restriction on expression, it would survive the attendant limited First Amendment review. The surcharge prohibition advances substantial government interests, protecting consumers from misleading pricing and excessive credit-card charges. Any impact the law has on expression is incidental to its permissible regulation of conduct. And Section 518 goes no further than necessary to advance the State's legitimate aims.

ARGUMENT

A. Price Regulations Like The New York Surcharge Prohibition Address Conduct Rather Than Speech.

The First Amendment bars government from abridging the freedom of "speech." It therefore goes almost without saying that "the Amendment has no application when what is restricted is not protected speech." *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 121 (2011). In particular, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011). As a consequence, it is essential to distinguish between speech and conduct—which the Court has done by considering both the past treatment of the regulated subject and whether the regulated activity communicates a particularized message that is comprehensible to the intended audience, absent further speech. Both of these considerations demonstrate that the activity regulated by Section 518 is conduct. New York's law therefore is not subject to First Amendment scrutiny at all.

1. A consistent understanding that the First Amendment does not apply to particular forms of conduct provides strong evidence that the conduct does not qualify as constitutionally protected speech.

First, and most simply, history and this Court's jurisprudence regard certain types of government regulation as falling outside the scope of the First Amendment. As the Court has explained, "[a] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *Carrigan*, 564 U.S. at 122 (citations and internal quotation marks omitted).

That understanding should be dispositive here. Economic regulations, and price regulations like New York's surcharge prohibition in particular, have long been regarded in just that way, as permissible regulations of conduct rather than as restrictions of speech or expressive activity. In fact, as both New York (at 23-24) and the United States (at 16-17) demonstrate in their briefs, governments at all levels in this country have a tradition of price regulation that predates the founding generation.

During the revolutionary years, nearly "every article in general use, as well as the wages of labor, were fixed by most of the state legislatures." Breck P. McAllister, *Price Control by Law in the United States: A Survey*, 4 Law & Contemp. Probs 273, 274 (1937) (describing adoption of colonial pricing schedules and prohibitions against the price-gouging practices of engrossing and forestalling); see *e.g.*, An Act to Regulate the Price & Assize of Bread, 6 Geo. 111.

Orig. Acts, vol. 5, p. 83; Recorded Acts, vol. 3, p. 11; N.H. Province Laws 387 (enacted Jan. 16, 1766). This history is of obvious relevance here: "[A] contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers* v. *United States*, 272 U.S. 52, 175 (1926). Accordingly, if price regulation is to be judged by the "practices and beliefs of the founding generation" (*Brown* v. *Entertainment Merchants Association*, 564 U.S. 786, 821 (2011) (Thomas, J., dissenting)), its exclusion from First Amendment coverage is appropriate.

And price regulation, by both the federal and the state governments, has continued without interruption to the present day. As the Court explained more than a century ago, "it has been customary in England from time immemorial, and in this country from its first colonization, to * * * fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold." *Munn* v. *Illinois*, 94 U.S. (4 Otto) 113, 125 (1876). See generally *Nebbia* v. *New York*, 291 U.S. 502, 532 (1934) (there is nothing "peculiarly sacrosanct about the price one may charge for what he makes or sells"). As a general matter, then, "[d]irectly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways)" "involve[es] no restriction on speech regarding lawful activity at all." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 524 (1996) (Thomas, J., concurring in part and concurring in the judgment). The Court has never suggested otherwise—and it appears that petitioners do not dispute the point. See Pet. Br. 43.

2. Conduct triggers First Amendment scrutiny only if its message is comprehensible.

a. Of course, some conduct does have, or may take on, expressive components that subject it to First Amendment scrutiny. But that is so only if the activity is "inherently expressive" and succeeds in making a deliberate statement. *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006). Fundamentally, conduct will be regarded as expressive—and therefore as constitutionally equivalent to speech—only if it conveys an intelligible message without regard to any accompanying speech.

Conduct is treated as though it is speech when it satisfies two conditions associated with conveying a message that is comprehensible to the viewer or listener: (1) when there is an "intent to convey a particularized message" *and* (2) the "likelihood [is] great that the message would be understood by those who viewed it." *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974)). For example, flag burning at protests is both intended and widely understood to signal displeasure with the federal government, and therefore to be expressive conduct subject to First Amendment scrutiny. *Ibid.* The display of yellow ribbons is generally understood to communicate support for U.S. troops today, just as black armbands were once worn to register opposition to the Vietnam War.[2] These acts implicate the First Amendment's

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[2] See *Tinker* v. *Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 505-506 (1969). Pickets, boycotts, sit-ins, walkouts, and marches all involve conduct, but when done with the purpose of stating a message or affecting public opinion are entitled to protection as a means of expression. See, *e.g.*, *Carey* v. *Brown*, 447 U.S. 455, 460 (1980) (reaffirming that prohibitions

values because they make intelligible contributions to the national conversation, whether or not one agrees with the statements made.

It is equally fundamental, however, that not *all* conduct qualifies as expressive. The Court has repeatedly rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968); see also, *e.g.*, *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."). The setting of a price, the styling of hair, and the preparation of food all may all involve some level of expression that would be constrained by state regulation and licensing. But because they advance no discrete and comprehensible statement, these acts are not inherently expressive activities. No one would seriously suggest, for example, that the requirement to obtain a barber's license implicates the First Amendment.

One clear guide to where to draw this line between speech and conduct was suggested in *Rumsfeld*: expressive conduct must be capable of

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against "peaceful picketing" regulate expressive conduct); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (finding conduct pertaining to a boycott of white merchants to be expressive); *Brown* v. *Louisiana*, 383 U.S. 131, 141-142 (1966) (acknowledging the "right in a peaceable and orderly manner to protest by silent and reproachful presence" through a sit-in at a segregated library).

communicating its message on its own terms, and "[t]he fact that * * * explanatory speech is necessary is strong evidence that * * * conduct * * * is not so inherently expressive that it warrants protection." *Rumsfeld*, 547 U.S. at 66. By the same token, the Court has been sensitive to context when recognizing conduct to fall within the First Amendment's scope. In deciding that nude dancing at adult theaters qualifies as "expressive conduct within the outer perimeters of the First Amendment," albeit "only marginally so," the Court thus accepted that the performers were conveying an erotic message that could be understood by their audience without any further elaboration. *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991). But such nudity at a beach "would convey little if any erotic message"—even if the same message were intended—without additional speech or context, and thus would not bring the First Amendment into play.

b. Considering this basic element of mutual comprehension on the part of speaker and listener as central to the existence of constitutionally protected expressive conduct, direct pricing regulations like Section 518 do not fall within even the "outer perimeters" of the First Amendment. The only particularized message a price inherently expresses is the price itself. If a retailer intends to communicate more than the dollars and cents owed by, for example, failing to attach a surcharge to the sticker price, the likelihood is exceedingly low that the message would be received. A merchant would need to discuss his or her reasons for making upward price adjustments as opposed to downward ones for the intended statement to be understood. The retail setting also fails to provide sufficient context to elevate pricing into expressive conduct. Whether a price is posted in a store, on

a restaurant menu, or at a box office, a price is universally understood to signify the cost of a product or service, and nothing more.

Of course, certain pricing structures may involve some level of "mental intermediation" and may influence consumer behavior in ways that ultimately align with a merchant's particular views. See Pet. Br. 31 (quoting *Am. Booksellers Ass'n, Inc.* v. *Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)). But the simple fact that an action has an effect on thought processes and behavior does not, in and of itself, make the act expressive. To offer just one example, in the commercial context the scent of vanilla might put shoppers in mind of snacks, elevate their mood, or manipulate them into visiting the store café. The store's management might even have intended this response. See Michael Morrison et al., *In-store Music and Aroma Influences on Shopper Behavior and Satisfaction*, 64 J. Bus. Res. 558 (2011). That effect, however, would not convert the release of vanilla scent into speech—or convert a state law that bars department stores from scenting their elevators with vanilla into a suppression of speech that is subject to First Amendment scrutiny.

B. New York's Pricing Regulation Targets Economic Conduct And Is Outside The First Amendment's Scope.

Against this background, both the text and the operation of Section 518 confirm that the New York surcharge ban is not a restriction of protected speech; it is, instead, a conventional economic regulation. The history of the New York legislation, as well as congressional statements regarding that statute's antecedent federal law, also support that

conclusion. As a law targeted at economic conduct and not speech, the New York surcharge ban is thus appropriately subject to rational basis review. Section 518 easily survives this level of scrutiny.

1. By its plain terms, New York's surcharge prohibition is a regulation of economic conduct.

The text of Section 518 contains a single directive: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. On the face of it, the sentence is directed to the regulation of economic conduct; the word "impose" means "to levy or exact" as in "a tax or duty." Black's Law Dictionary (10th ed. 2014). The term has historically been understood to have regulatory connotations. Variations of it, used in a regulatory sense, are sprinkled through the Constitution: The Eighth Amendment uses the word "impose" in relation to "fines," and the cognate "imposts" appears four separate times alongside the words "taxes," "duties," and "excises." U.S. Const. art. I, §8, cl. 1; *id.* art. I, §10, cl. 2.

Beyond that, the surcharge prohibition does not "silenc[e] merchants' attempts to call consumers' attention to the true costs of credit" (Pet. Br. 8), or "muzzl[e]" those who would like to "tell their side of the story" about credit card swipe fees. *Id.* at 33. It is not concerned with censorship. See *id.* at 3. Section 518 does not bar merchants from talking about credit card swipe fees, or from expressing their support for or opposition to them. It does not prevent retailers from "put[ting] up signs asking customers to 'STOP UNFAIR CREDIT CARD FEES,'" or lobbying the New York Assembly to amend the statute. See Pet.

Br. 20 (describing 7-Eleven's campaign against swipe fees and its 1.6-million-person petition effort).

Section 518, moreover, does not require or forbid expressive conduct. Some retailers might like to adopt a surcharge because they share petitioners' views, but others might do so because they think a surcharge would be easy to apply or believe freedom to impose a surcharge would help their bottom lines. For these reasons, a customer faced with a surcharge would have no idea what statement, if any, is being made by the merchant. It follows that a surcharge in itself would not be inherently expressive.

In all, then, Section 518 does not "suppress information in order to manipulate the choices of consumers" or "keep[] would-be recipients of * * * speech in the dark." *44 Liquormart*, 517 U.S. at 521, 523 (Thomas, J., concurring in part and concurring in the judgment). It "neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product." *Sorrell*, 564 U.S. at 585-586 (Breyer, J., dissenting). It is, instead, an ordinary economic regulation that is within the State's authority to administer. Accordingly, Section 518 is just the kind of direct economic regulation that the Court has long described as unaffected by the First Amendment. Cf. *44 Liquormart*, 517 U.S. at 507 (plurality opinion) (suggesting that alcohol consumption may be deterred through "higher prices * * * maintained either by direct regulation or by increased taxation"); see also *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 581 (1980) (favoring "direct regulation" of commercial activity over "suppression of speech").

In response to this common-sense observation that Section 518 addresses prices that may be charged, petitioners and the United States contend that, because the statute does not preclude a merchant from setting its price at any given level, it "addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*." U.S. Br. 19; see Pet. Br. 27-28. Their theory appears to be that Section 518 limits the terms used to characterize the pricing scheme rather than the substance of the scheme's operation. But that simply is not so. The surcharge prohibition regulates the relationship between the standard price—that is, the sticker price in common retail settings, understood to be the most widely posted and visible price that consumers expect they will pay when a product is rung up at the register—and the final price at sale. The sticker price may be reduced, but it may not be increased by addition of a credit-card surcharge. This law, as written, has real economic consequences that have nothing to do with semantics. Section 518 regulates the marketplace, not the marketplace of ideas.

2. The history of the New York surcharge prohibition and the predecessor federal ban demonstrates a concern with regulating economic conduct.

This understanding of the meaning of Section 518—as a regulation of economic conduct—is confirmed by examination of the purpose underlying the lapsed credit-card surcharge ban under the federal Truth in Lending Act: to protect consumers against price gouging. The federal ban, adopted in 1976, Pub. L. No. 94-222, 90 Stat. 197 (1976), expired eight years later. To keep the surcharge ban alive, the

New York Assembly enacted the price regulation contained in Section 518 using virtually identical language. Compare N.Y. Gen. Bus. Law § 518 ("No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.") with 15 U.S.C. §1666(f) (1976) ("No seller in any sales transaction may impose a surcharge on a cardholder who elects to use credit card in lieu of payment by cash, check, or similar means."). The federal law thus provides substantial guidance on the meaning of the New York legislation.

There is little doubt that the federal statute was intended to, and did, function as a regulation of economic conduct. The U.S. House of Representatives adopted the surcharge ban so that "no consumer should ever have to pay more than the regular price of goods and services," on the understanding that "surcharging credit card users would place a terribly unfair burden on already hard-pressed consumers." 121 Cong. Rec. 36927 (1975) (emphasis added). Overall, the federal law was meant to benefit consumers in multiple ways: "By encouraging sellers to offer cash discounts, [and] by prohibiting sellers from surcharging credit card use." *Ibid.* (emphasis added); see also U.S. Br. 3-9.[3]

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[3] See, *e.g.*, The Fair Credit Billing Act Amendments of 1975: Hearing Before the H. Subcomm. on Consumer Affairs of the Comm. on Banking, Housing, and Urban Affairs, 94th Cong. 6 (1975) ("[G]uaranteed payment and increased business is more than worth the merchant's costs for affiliation, * * * a surcharge to the consumer would be an unfair shift of the responsibility for these benefits."); 121 Cong. Rec. 36927 (1975) ("[T]he whole thrust of this legislation is to encourage retailers to offer price differentials by giving price reductions to those who pay by

There is no indication that New York wished to depart from this regulatory purpose. To the contrary, there is every reason to believe that the New York legislature intended the state law to be co-extensive with the federal ban. The clearest indication of this, of course, is the legislature's choice of virtually identical statutory text. And although there is little explanatory history accompanying the New York legislation—seemingly because New York legislators understood the state law to be a straightforward reenactment of the federal rule—what there is confirms New York's regulatory intent.

Thus, making reference to the expired federal ban, one of the co-sponsors of the New York bill declared that "[t]he consumers of New York State must not be required to forego this essential protection in the market place because Congress cannot * * * resolve the somewhat technical points." J.A. 84. Surcharges, the New York legislature feared, would subject consumers to "dubious marketing practices and variable purchase prices." *Id.* at 83. The State Consumer Protection Board wholeheartedly endorsed the measure, while supporting the availability of cash discounts; "[s]urcharges, even if only psychologically, impose penalties on purchasers and may actually

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cash. * * * [D]iscounts to cash customers are an equitable way to benefit cash-paying users, and it gives retailers, small and large, more pricing freedom than they have now."); The Cash Discount Act & The National Consumer Usury Commission: Hearing Before the H. Subcomm. on Consumer Affairs of the Comm. on Banking, Housing, and Urban Affairs, 96th Cong. 3 (1980) ("This form of price gouging is outrageous * * * because with certain purchases such as gosoline [sic], a consumer [who] has an absolute need to make the purchase * * * [but is] unable to pay by cash * * * would have no alternative but to pay the surcharge penalty.").

dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." J.A. 89. The Board stressed the importance of permitting consumers to rely on advertised prices and argued that "[a]llowing credit card surcharges may defeat this effort * * * by permitting unannounced price increases at the point of sale." *Ibid.* No mention was made of merchants' speech in the description of the rationale for this dual-pricing scheme.

Petitioners' reliance on New York's enforcement history to suggest that the law governs speech rather than conduct (Pet. Br. 28-30) is wrong for related reasons. In 2008 and 2009, the New York Attorney General's Office conducted enforcement sweeps targeting merchants who listed a regular price and then noted a surcharge on top of that. J.A. 98-100, 105-109, 123-145. For example, one fuel retailer said his process was to "tell [customers] the price of fuel (for example, $3.45/gallon) and then explain that there was a surcharge on top of that price for paying with a credit card (for example, $.05/gallon)." This retailer was not targeted because he used the wrong words, but because, by his own admission, he was imposing a surcharge over the regular price. Under Section 518, retailers may not tack extra fees onto that price. If a retailer says there is a surcharge, this means that the merchant is either misstating the sticker price and therefore engaging in "false, deceptive, and misleading commercial speech" (*Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 576), or speaking truthfully but engaging in the conduct that Section 518 bans by imposing a surcharge in fact.

3. Direct economic regulations like the surcharge prohibition receive rational basis scrutiny.

Because Section 518 does not infringe freedom of speech under the First Amendment, it is subject only to rational basis review under the Due Process Clause. See, *e.g.*, *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). The statute easily survives this review.

New York is not relying on a measure whose "relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Instead, New York has offered a set of reasonable motivations for its surcharge ban. In particular, the State sought to avoid "dubious marketing practices and variable purchase prices" (J.A. 83) "by permitting unannounced price increases at the point of sale." J.A. 89. Surcharges, "even if only psychologically, impose penalties on purchasers." *Ibid.* These rationales match those offered in favor of the federal ban. See, *e.g.*, 121 Cong. Rec. 36927 (1975) ("[S]urcharging credit card users would place a terribly unfair burden on already hard-pressed consumers."). The United States recognizes these as the goals of the 1976 federal surcharge ban. See U.S. Br. 4-5.

Indeed, empirical studies have shown that Congress and the New York Assembly had substantial bases for enacting surcharge legislation. Credit card surcharges have high social costs. In the Netherlands, for example, surcharges are allowed only on debit cards. One study by economists at the Bank of Netherlands concluded that instituting a surcharge ban could lead to significant savings. Wilko Bolt, Nicole Jonker & Corry van Renselaar, *Incentives at the*

Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands, 34 J. Banking & Fin. 1738 (2010); see also Hélène Bourguignon, Renato Gomes & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10(2) Competition Pol'y Int'l 13, 16-17 (2014) (addressing U.K. surcharge ban). In Australia, the lifting of a surcharge ban on all credit-card purchases resulted in merchants imposing increasingly higher surcharges—up to twice the amount of fees actually charged by credit card companies. Marc Rysman & Julian Wright, *The Economics of Payment Cards*, 13 Rev. Network Econ. 303, 303-353 (2014). The New York State Consumer Protection Board cited this same concern in support of the state ban. J.A. 89. The lived experience with surcharge bans thus confirms the significant social benefits rationally envisioned by the New York Assembly.

C. Expanding The Definition Of Speech To Cover The Economic Conduct Regulated By Section 518 Would Jeopardize Vital State And Federal Interests.

Accordingly, classifying pricing as speech—and the surcharge prohibition as a law regulating speech—would depart radically from this Court's precedent and hobble the ability of States and the federal government to regulate economic conduct. In arguing to the contrary, petitioners and certain of their *amici* rely on the Court's recent decisions in *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552 (2011), and *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015). But those holdings do not work a change in the way the Court has distinguished between speech and conduct. And as commentators have noted, mistakenly

reading these decisions in such a fashion would jeopardize a wide range of vital state and federal interests.

Reed and *Sorrell* are fully consistent with this Court's longstanding view that regulated activity must communicate some comprehensible and particularized message, on its own, to qualify as speech protected by the First Amendment. What these decisions clarified is that laws may not escape First Amendment scrutiny simply by burdening *all* the possible messages within a particular genre of communication or topic area. Although less "egregious" than viewpoint-based discrimination (*Reed*, 135 S. Ct. at 2223), these sorts of laws nevertheless are a form of content-based speech discrimination. In *Reed* and *Sorrell*, any *specific* marketing materials (as in *Sorrell*) or *specific* church signs (as in *Reed*) undoubtedly would have had to communicate some particularized message to qualify for First Amendment protection in the first place. That is, the regulated activities covered by the statute at issue in *Sorrell* and the town ordinance at issue in *Reed* fell squarely on what is recognized to be the "speech" side of the speech/conduct line.

As the Court noted in *Sorrell*, a content-based limit on speech may concern, not one "particularized message," but a whole genre or category of communication encompassing many different possible messages. There, a Vermont law placing restrictions on the use that could be made of physician-identifying prescription information did not restrict what sorts of statements marketers could make with that information in hand. Rather, the law swept more broadly, banning the use of that information in *any* kind of marketing. Although Vermont argued that

the law regulated conduct, the Court found that it precluded the use of specified information "for marketing" and thus "disfavor[ed] marketing, that is, *speech* with a particular content," an aspect of "educational communication." 564 U.S. at 564.

Similarly, *all* messages advertising religious services were disfavored in *Reed*, although the challenged ordinance did not disfavor any particular religious message or any particular religion's sign. And although "[g]overnment discrimination among viewpoints * * * is a more blatant and egregious form of content discrimination," "[t]he First Amendment's hostility to content-based regulation [also] extends * * * to prohibition of public discussion of an entire topic." *Reed*, 135 S. Ct. at 2230 (internal citations and quotation marks omitted).

It is unquestionable that any given church sign regulated by the Town of Gilbert, or any given marketing materials affected by the Vermont statute, would communicate a particularized message comprehensible by the viewer or listener. Thus, although the general "content-based" regulations at issue in *Sorrell* and *Reed* swept broadly, burdening *all* the various possible messages within a given subject area or genre, nothing about these decisions changed the Court's existing First Amendment framework insofar as it applies here: it remains the case that regulations of speech "are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell*, 564 U.S. at 567.

For this reason, commentators have warned that an expansive reading of *Sorrell* and *Reed* would pose the risk of "Doctrinal Distortion" (Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 Wm & Mary L. Rev. 1613, 1634 (2015)) that

would offer a boon to litigators "seeking a way of fighting against some form of regulation or prosecution." *Id.* at 1629. That process could "devitaliz[e]" the First Amendment by, as Justice Powell warned for the Court, extending the First Amendment's protection to the economic realm in a way that "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect" to traditionally protected noncommercial speech. *Id.* at 1635 n.109 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

Others, including members of the Court, have invoked *Lochner* v. *New York*, 198 U.S. 45 (1905), suggesting that applying the First Amendment to non-expressive conduct could make it into a "powerful engine of constitutional deregulation." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 167 (2015). See *Sorrell*, 564 U.S. at 591-592 (Breyer, J., dissenting). Thus, if the terms "content-based" and "speaker-based" are stretched beyond their definitional limits so as to include conduct, nearly all economic regulations would be vulnerable to First Amendment challenge—a result that "would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives." *Sorrell*, 564 U.S. at 585 (Breyer, J., dissenting). That would leave the Court with "no limiting principle and * * * would render self-government impossible." Amanda Shanor, *The New Lochner*, 2016 Wisc. L. Rev. 133 (2016).

One can easily imagine examples of this problem. The use of fireworks, for instance, can be expressive, and the act of selling them may—like most commer-

cial transactions—involve words. They also are dangerous, and their use and sale is often highly regulated. If their potential expressive quality converts the sale of fireworks into speech, an expansive reading of *Sorrell* and *Reed* would subject laws regulating fireworks sales to strict scrutiny because they target only fireworks purveyors and incidental fireworks-related communication. That would be a dramatic, and destructive, turn in the law.

Evidently recognizing this danger, petitioners state that this "is not a case about '*Lochner*-ization," suggesting that few New York laws likely would be affected if Section 518 were struck down. Pet. Br. 34-35. But the doctrinal consequences of treating pricing as speech rather than conduct would be widely felt.

Under petitioners' theory, for example, federal discount restrictions on tobacco products could be unconstitutional regulations of "pricing speech."[4] Similarly, the space explicitly left by Congress for local and state experimentation with stricter tobacco restrictions would be at risk if pricing were treated as protected speech.[5] Or "happy hour" regulations in numerous States that restrict reducing the price of

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[4] See, *e.g.*, Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (codified at 21 U.S.C. § 301 et seq.) (prohibiting the sale of tobacco products through mail-order coupon redemption).

[5] See, *e.g.*, Cal. Health & Safety Code § 118950 (West 2008) (prohibiting distribution of coupons and rebate offers for tobacco products); Md. Code Ann., Crim. Law § 10-107(b)(2) (West 2007) (prohibiting the distribution of tobacco coupons to minors); Tex. Health & Safety Code §161.087(a) (West 2015) (same).

alcoholic drinks could be unconstitutional limits on speech.[6]

All of these, and myriad other similar regulations, are directed at particular forms of pricing. Such rules logically are understood to be regulations of conduct. Nothing in *Sorrell*, *Reed*, or any other decision of this Court converts such everyday pricing regulations into restrictions of speech.

D. Even If The Surcharge Prohibition Incidentally Limits Expression, The Law Survives First Amendment Scrutiny.

This Court's First Amendment jurisprudence strongly supports classifying the regulated activity in this case—standard terms of pricing—as conduct, not speech. But the Court has also recognized that certain forms of regulated activity can mix elements of speech and conduct. "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

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[6] See, *e.g.*, 204 Mass. Code Regs. 4.03(1)(c) (West 2016) (providing that no liquor licensee may "sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public"); 3 R.I. Gen. Laws Ann. § 3-7-26(a)(1)-(3) (West 2009) (no liquor licensee may "[c]ause or require any person or persons to buy more than one drink at a time by reducing the price of that drink" or "[s]ell, propose to sell or deliver to any person or persons an unlimited number of drinks during a certain period of time for a fixed price").

Here, if standard terms of pricing are thought to be a mixture of speech and conduct, the surcharge prohibition would be constitutional under the test articulated in *O'Brien*. This test, which is similar to but less stringent than the standard governing regulations of commercial speech stated in *Central Hudson*, asks whether the government interest (1) is "substantial" and (2) "unrelated to the suppression of free expression," and (3) the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 376, 377. The surcharge prohibition satisfies all three prongs of this test.

First, there can be no question that the government has a substantial interest in standardizing the terms of pricing disclosed to consumers. Requiring that retailers disclose their prices in a particular, standard set of terms allows consumers to make apples-to-apples comparisons between those selling products or services. This is precisely the logic behind the requirement in the Truth in Lending Act, 15 U.S.C. § 1601, that most consumer credit transactions disclose the annual percentage rate, or APR.[7] "The APR, which must be disclosed in nearly all consumer credit transactions, is designed to take into account all relevant factors and to provide a uniform measure for comparing the cost of various credit transactions."[8] There may be many alternative mathematically equivalent ways to express an inter-

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[7] That is how the Federal Reserve explains the APR requirement in its Consumer Compliance Handbook (at 10) for the Truth in Lending Act's Regulation Z, at https://perma.cc/SQ27-QTAQ.

[8] *Id.* at 9.

est payment, but the State undoubtedly has a substantial reason for standardizing these terms.[9]

Aside from the State's broad interest in standardizing price disclosures in general, the decision to ban surcharging in particular—charging a higher price than the sticker price—serves other, related economic interests. This is because, as the New York legislature recognized, surcharges cause unique harms that discounts do not.

Two of these harms relate to consumer protection, where the State has a clear and substantial interest. For one thing, the sticker price is by its very nature the one that is most visible and comprehensible to a consumer. Given that not all consumers will notice or digest additional disclosures beyond that price, the prohibition on surcharges ensures that consumers never mistakenly pay more than the clearest and most visible price. See Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 Am. Econ. Rev. 1145, 1146 (2009) (finding a decline in consumer demand when surcharges are disclosed before the point of sale). If the highest price is not the one on display, a consumer could experience the surcharge as a surprise, learning of the extra cost only after swiping a card and receiving the receipt. By

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[9] As the Scholars of Behavioral Economics rightly point out in their *amicus* brief in support of the petition, "the public policy implications of different frames can be profound. For example, the 'miles per gallon' formulation for vehicle fuel efficiency is misleading compared to a 'gallons per mile' frame." Scholars of Behavioral Economics in Support of Petition Br. 11. While not about pricing as such, this example actually supports *respondents'* contention that the State has a legitimate consumer-protection interest in promoting certain standard pricing terms over other mathematically equivalent ones.

this point, it is too late to stop a transaction that the consumer might not have made if all costs were incorporated in the sticker price. See Todd J. Zywicki et al., *Behavioral Law and Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws* 9 (Intl. Cent. Law & Econ. Fin. Reg. Research Prog. Paper, 2016), *availabe at* https://perma.cc/45ZA-VSWW ("When a consumer is met at the register with a *higher* price than that posted when she selected the store or chose her items * * * there is an element of deception in the price"). An unexpected discount does not carry the same risk.

In addition, and relatedly, surcharges have no ceiling: they can deviate upward as far from the base price as the retailer feels it can get away with. Economists have voiced this concern. See Hélène Bourguignon, Renato Gomes & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10(2) Competition Pol'y Int'l 13, 21 (2014) ("Because merchants use card surcharges as a price discrimination device * * *, the merchant always 'overshoots' in the surcharge * * * In contrast, because cash discounts are a costly gift to consumers, the merchant always 'undershoots' in the discount."). This creates the opportunity for "windfall profits"—in excess of what credit card companies charge the retailers—that come out of the pockets of consumers. See *supra*, at 17-18 (noting examples from Australia, the Netherlands, and the United Kingdom); see also Wilko Bolt, Nicole Jonker & Corry van Renselaar, *Incentives at the Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands*, 34 J. Banking & Fin. 1738, 1739-41 (2010) (discussing how allowing merchants in cer-

tain industries to impose surcharges affects customers).

Further, because retailers already factor in consumer behavior when setting prices, surcharging allows a retailer to extract more in single-sticker situations. Retailers may end their price with the number "9"—as in $9.99 rather than $10—because "nine-ending prices are perceived to be smaller than a price one cent higher." Manoj Thomas & Vicki Morwitz, *Penny Wise and Pound Foolish: The Left-Digit Effect in Price Cognition*, 32 J. Consumer Res. 54, 54 (2005); see also Mark Stiving & Russell S. Winer, *An Empirical Analysis of Price Endings With Scanner Data*, 24 J. Consumer Res. 57, 57 (1997) ("Surveys support the premise that firms set prices to appear that they are just below a round number."). Surcharges allow retailers to take advantage of this anchoring effect while consumers pay the very price they sought to avoid.

The observation that a surcharge may be mathematically equivalent to a discount is thus beside the point in many ordinary commercial settings: if a retailer prices a product at $99 with a two percent credit surcharge, it is more likely to make the sale, while getting more from consumers in the process. See Hélène Bourguignon, Renato Gomes, & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10(2) Competition Pol'y Int'l 13 (2014).

Second, these substantial state interests—standardizing the terms of pricing and preventing the specific economic harms tied to surcharging—satisfy the second prong of the *O'Brien* test, as all are "unrelated to the suppression of free expression." *O'Brien*, 391 U.S at 377. To the extent that retailers

wish to express their unhappiness with the fees imposed by credit card companies, complain explicitly about the State's policy decisions, or even actively attempt to persuade consumers to make economic decisions at odds with the State's regulatory goals, they are free to do so through any means of expression they choose. Again, the State did not attempt to prohibit any of these expressive activities.

Third, it is clear that any incidental impact on speech following from the surcharge prohibition, to the extent that one exists, is "no greater than is essential to the furtherance of [the State's] interest." *O'Brien*, 391 U.S. at 377. The State cannot standardize the terms of pricing—or prohibit a harmful pricing arrangement—without affecting in some fashion the numbers and labels that retailers use to disclose those terms to consumers. Like regulations that require "miles per gallon" disclosures instead of "gallon per mile" disclosures (Scholars of Behavioral Economics in Support of Petition Br. 11), the law thus does have some incidental impact on the words and numbers that that sellers of goods or services may use in communicating the pricing scheme accurately. But this impact is no broader than the words and numbers necessarily used to disclose the pricing terms to consumers.

For these reasons, even if this Court finds that the no-surcharge law regulates an activity best characterized as a mixture of speech and conduct, the law clearly satisfies each prong of the *O'Brien* test and survives First Amendment scrutiny.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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